APPEALS PANEL NO. 92075
FILED APRIL 7, 1992

On January 28, 1992, a contested case hearing was held in _____, Texas, (hearing officer) presiding as hearing officer. He determined the claimant gave timely notice of her injury and was entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Carrier urges error in the hearing officer's findings of fact and conclusion of law regarding the timeliness of notice and argues the claimant failed to meet her burden of proof and that the evidence is, at best, "evenly balanced."

DECISION

We affirm. There is sufficient evidence to support the hearing officer's findings, conclusions, and decision.

The only issue in this case is whether there was good cause for the claimant's failure to notify the employer of her injury within 30 days from the date of injury. Article 8308-5.02(2), 1989 Act. It has been held that the initial belief that an injury is not serious may be good cause for not filing a notice of injury within 30 days. Texas Casualty Insurance Co. v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960, no writ); Texas Workers' Compensation Commission Appeal No. 91123, decided February 7, 1992.

The claimant worked as a secretary for (employer), who carried workers' compensation coverage with the carrier. The claimant testified that on May 23, 1991, while moving supplies, including a heavy box (approximately 50-60 pounds) of computer paper, she injured her back. Since she had a previous back injury in 1979 for which laminectomy and discectomy procedures were performed in 1981, she did not realize she had sustained a new or aggravated injury on May 23, 1991. She testified that she lifted the box of computer paper correctly but that she felt a pain in her left side as she carried the box. She stated she told a coworker, Ms. A, that carrying the box had really taken the life out of her. She also stated because of the pain she took some aspirin.

The claimant's daughter picked her up after work and noted she was moving slowly and had a difficult time getting into the car. The claimant explained to her daughter that her back was "killing" her and explained that she had been moving supplies. The daughter stated that her mother's back pained her two to three times a week and her back would be worse after she exerted herself. She said the claimant's condition became worse after May 23, 1991. The daughter finally advised the claimant to see a doctor.

The claimant testified she continued working after May 23, 1991, although in pain because she had no sick leave, needed the job, and kept hoping the pain would get better. She also stated she had some vacation coming in early August and intended to stay in bed. She went to a pain clinic on August 6th and saw a Dr. W who had tests done on her including an MRI because he thought her condition might be more serious than the claimant thought. He subsequently told her that her disc looked "real severe" and that she had a bulging disc,

and referred her to Dr. S. This was the first that claimant claims she realized or knew that her injury was so serious and resulted from something other than her old surgery and back problem. She notified her supervisor of the injury and circumstances and was subsequently told to come in and make a report. When the supervisor inquired why the claimant had not previously reported the injury, the claimant told her she already had a back injury and had not thought it serious enough at the time. Surgery was subsequently performed on the claimant's back on August 26th, and the medical reports indicated the pre-op diagnosis as lumbar 4-5 herniated nucleus pulposus and the final pathological diagnosis as disc material L4-5, degenerative disc disease.

A note from Dr. S dated January 21, 1992, states:

> [Claimant] has asked me to respond to the question whether it was possible for her to have been injured in May and to continue working thereafter until August. I would have to respond that it is possible, especially since the pain syndrome she may have experienced may have increased in intensity over that period of time to where she could no longer continue working after August. It is not unusual for patients to deal with a pain syndrome related to nerve impingement for several weeks to several months before seeking professional attention.

The claimant has also been on a continuous rehabilitation program since her surgery of August 26th.

In the employee accident report, a supervisor's comment indicated she was unaware of claimant's injury until August 12th, that she, the supervisor, spoke to Ms. A who stated that she remembers the incident, that the claimant did all the lifting because Ms. A was pregnant, but that she (Ms. A), didn't remember the claimant complaining of pain more than she usually does.

The claimant denied she ever asked Ms. A to change her statement. A statement of Ms. A introduced into evidence indicates that in a telephone conversation of December 16, 1991, the claimant asked Ms. A to change her statement "in order to back her up." Ms. A stated that the claimant wanted her, Ms. A, to state she saw the claimant hurt her back picking up a box of computer paper.

As indicated, the hearing officer, after considering all the evidence of record, found as fact, and concluded in applying the law to those facts, that there was good cause for the claimant not reporting the injury within 30 days following May 23rd. "Good cause" is that legal excuse preventing a reasonably prudent person from complying with the notice requirements and whether a person has exercised the degree of diligence under the ordinary prudent person test is usually a question of fact to be determined by the trier of fact. Farmland Mutual Insurance Co. v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ). A failure to file may be established based upon the belief that the injuries were

trivial and the claimant had no affirmative medical evidence to the contrary. Alvarez, *supra*. The hearing officer determined the claimant met her burden of proof by a preponderance of the evidence. The hearing officer, being the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence (Article 8308-6.34(e), 1989 Act), had before him sufficient evidence to make the findings, conclusions, and decision that he made. It was within his authority and responsibility to resolve any conflicts in the evidence and testimony and arrive at finding of fact. *See* Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). He quite apparently gave weight to the testimony of the claimant which he could appropriately do. As the court stated in Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ) where a claimant testified as to her injury:

> She is, of course, an interested witness and her testimony does no more than raise a fact issue for the jury. [Citation omitted.] Nonetheless, the jury had a right to believe her testimony, and believing it, had a right to find that she did suffer an injury. . . .

See also Texas Employers' Insurance Association v. Thompson, 610 S.W.2d 208 (Tex. Civ. App.-Houston 1981, no writ); Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ).

In his Finding of Fact Number 8 and Conclusion of Law Number 5, it appears the hearing officer, in addition to determining that good cause existed for the late filing, applied the test for late filing applied to situations involving occupational diseases. Article 8308-5.01(a). This does not affect the finding and conclusions going to the good cause issue and we treat it as surplusage not necessary or applicable in our disposition of the case. *See* Texas Indemnity Insurance Co. v. Staggs, 134 S.W.2d 1026 (Tex. 1940).

Having reviewed the entire records and the matters submitted in the request for review and reply thereto, we are satisfied that the evidence is sufficient to support the findings, conclusions, and decision of the hearing officer. Clearly, his determinations are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Can v. Bain, 709 S.W.2d 175 (Tex. 1986).

The decision is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge